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What the Lawless Obamacare Ruling Means

It's not based on a solid legal argument. It's an exercise in raw judicial power.

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In a shocking legal ruling, a federal judge in Texas wiped Obamacare off the books Friday night. The decision, issued after business hours on the eve of the deadline to enroll for health insurance for 2019, focuses on the so-called individual mandate. Yet it purports to declare the entire law unconstitutional — everything from the Medicaid expansion, the ban on pre-existing conditions, Medicare and pharmaceutical reforms to much, much more.

A ruling this consequential had better be based on rock-solid legal argument. Instead, the opinion by Judge Reed O'Connor is an exercise of raw judicial power, unmoored from the relevant doctrines concerning when judges may strike down a whole law because of a single alleged legal infirmity buried within.

We were on opposing sides of the 2012 and 2015 Supreme Court challenges to the Affordable Care Act, and we have different views of the merits of the act itself. But as experts in the field of statutory law, we agree that this decision makes a mockery of the rule of law and basic principles of democracy — especially Congress's constitutional power to amend its own statutes and do so in accord with its own internal rules.

The individual mandate is the law's controversial requirement that all Americans maintain qualifying health insurance coverage or pay a penalty. In 2012, the Supreme Court upheld this penalty as an exercise of Congress's taxing power. In 2017, unable to get the votes to repeal the entire law, Congress just zeroed out the penalty.

In this case, Texas and 19 other states argue that with zero penalty, the mandate lacks a constitutional basis because it will no longer be enforced like a tax. If that were all there was, the case would have little consequence because starting in 2019, the mandate is unenforceable.

But audaciously, the states argued — and Judge O'Connor agreed — that the rest of Obamacare must fall, too. They claim that the mandate is so central to the A.C.A. that nothing else in it can operate without it.

That's not how the relevant law works. An established legal principle called "severability" is triggered when a court must consider what happens to a statute when one part of it is struck down. The principle presumes that, out of respect for the separation of powers, courts will leave the rest of the statute standing unless Congress makes clear it did not intend for the law to exist without the challenged provision. This is not a liberal principle or a conservative principle. It is an uncontroversial rule that every Supreme Court justice in modern history has applied.

Sometimes severability cases are difficult because it is hard to guess how much importance Congress attributed to one provision, especially in a lengthy law like the Affordable Care Act. But this is an easy case: It was Congress, not a court, that eliminated the mandate penalty and left the rest of the statute in place. How can a court conclude that Congress never intended the rest of the statute to exist without an operational mandate, when it was the 2017 Congress itself that decided it was fine to eliminate the penalty and leave the rest of the law intact?

The 55-page opinion devotes just two pages to the intention of the 2017 Congress. Instead, it relies on the perspective of the 2010 Congress that enacted the law, and two Supreme Court cases that were charged with asking questions about that 2010 Congress's intent. While the dozens of pages rehearsing those old viewpoints may look superficially sound, that part of the opinion is smoke and mirrors, because the 2010 Congress's intention *is not relevant to this case* — the 2010 law is no longer what is at issue.

Congress is allowed to amend its own law, and the Constitution does not permit any court to undermine that power. Still, Judge O'Connor wrote that we cannot divine the intent of the 2017 Congress because Congress didn't have the votes to repeal the entire law but wished it could. That's ridiculous. Congressional intent is all about the votes. One would not say Congress wished it could repeal the Civil Rights Act if only a minority of

Congress supported such a move. It is conservative judicial doctrine 101, as repeatedly emphasized by Justice Antonin Scalia, that the best way to understand congressional intent is to look at the text Congress was able to get through the legislative process.

Instead, Judge O'Connor goes down a rabbit hole, hypothesizing whether the 2010 Congress would have enacted the entire law without the mandate and whether the law can function without it. What findings Congress made in 2010 are irrelevant to the interpretation of this later legislative act. Regardless, Congress's own act of 2017 makes clear Congress thinks the law works without an operational mandate. To believe otherwise is to assume Congress enacts unworkable laws and that is not what courts are allowed to presume. Judge O'Connor's claim to the contrary is the equivalent of saying that your 2017 tax cut isn't valid because the 2010 Congress also enacted a tax bill, and wouldn't have included your tax cut there.

What happens next? The health law is likely to continue in place while the case moves to the higher courts. California, the leader of a group of states that stepped in to defend the law because the Justice Department refused to do so, will almost certainly go to the Fifth Circuit — the federal appellate court that presides over Texas — to have the effects of the decision paused and the case reviewed. The House of Representatives will also likely join the lawsuit once the Democrats take control.

If the Fifth Circuit reverses Judge O'Connor, we think it unlikely the Supreme Court will take the case. If the Fifth Circuit upholds the ruling, we are skeptical a majority of the court would sustain this weak analysis.

Chief Justice John Roberts is sensitive to allowing the court to be an instrument of politics, particularly when doing so violates separation of powers. Justice Brett Kavanaugh is an expert on statutory interpretation who has previously said that courts should "sever an offending provision from the statute to the narrowest extent possible unless Congress has indicated otherwise in the text of the statute." To do otherwise would be for the court to substitute its own judgment for Congress's.

Justice Clarence Thomas has opined that the kind of hypothesizing analysis on which Judge O'Connor relied is inappropriate: Congress's intentions "do not count," he wrote earlier this year, unless they are "enshrined" in a text that made it through the "constitutional processes of bicameralism and presentment" — as everyone agrees the 2017 tax bill did.

Friday was another sad day for the rule of law — the deployment of judicial opinions employing questionable legal arguments to support a political agenda. This is not how judges are supposed to act. Reasonable people may disagree on whether the health law

represented the best way to reform America's health care system, and reasonable people may disagree on whether it should be replaced with a different approach. Yet reasonable people should understand such choices are left to Congress, not to the courts.

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